Supreme Court of the United States

OCTOBER TERM, 1958

No. 564

METROPOLITAN SAND & GRAVEL CORPORATION, as owner of the Tugs METROPOLITAN No. 2 and METROPOLITAN No. 3, and the Sand Scows G-G 202, G-G-150 and G-G 104,

Petitioner,

against

DEEP SEA TANKERS, LIMITED, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Respondents.

REPLY BRIEF OF PETITIONER, METROPOLITAN SAND & GRAVEL CORPORATION, TO THE BRIEF OF RESPONDENTS IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In response to the cross-petition of Metropolitan Sand & Gravel Corporation, Deep Sea Tankers, Limited has filed in opposition a 17 page brief together with an appendix of some 52 pages replete with both excerpts from the testimony and argumentation based on such excerpts. The argument of Deep Sea Tankers, Limited is directed exclusively at the shoring-up of the opinion of the Court of Appeals with respect to its factual divergences from the findings of the District Court. The assertion is thus implicitly made that if the factual determination of the Court of Appeals is thus sustained, then the cross-petition of Metropolitan must fall.

This basic assumption, it is submitted, is entirely erroneous and does not answer the question of law presented, i.e., "whether the Court of Appeals under the standards applied reached the proper result, as to liability, on findings made by it."

Assuming but not conceding each and every factual conclusion made by the Court of Appeals and re-asserted now by the respondents, then petitioner Metropolitan contends that the Tug *Metropolitan No. 2* is without liability.

The Court of Appeals found that the length of the carfloats was 291 feet each (Cross-Petitioner's App. 19a) and that "we have two long, unwieldly tows, one immediately behind the other and in a position to pass to port of the first tow, the intervening distance between the two being 100 feet or so, crossing the bow of the tanker on a westerly or northwesterly course, at a point where the tanker is already south of the Range" (Cross-Petitioner's App. 28a). The Court of Appeals repeated later "we have already found that they (referring to the two tows) were about 100 feet apart as they crossed the tanker's bow" (Opinion Cross-Petitioner's App. 33a, matter in parenthesis ours), and that "As the two tows proceeded downstream the Railroad carfloats gradually came closer and closer to the sand tow, intending to pass to port of the sand tow; and the carfloats did pass to port of the sand tow, the actual passing taking place after the carfloats went under the bow of the *Rincon Hills*" (Opinion Cross-Petitioner's App. 20a) and "that the two tows were a good ship's length and a half away when he (referring to the pilot) sounded the alarm; that two minutes elapsed between the sounding of the alarm and the grounding: He (referring to the pilot) said he could not bear to port because of the presence of the sand tow • • •" (Opinion Cross-Petitioner's App. 35a, matter in parenthesis ours).

The *Rincon Hills* was 523.5 feet in length (Opinion Cross-Petitioner's App. 18a).

Attached to the brief of respondents in opposition is a chart drawn by the said pilot which demonstrates the finding and shows the position of the *Rincon Hills* at the sounding of the alarm (labeled RH 2) to be in the line of but not yet up to the Range; and also shows the tow of the *Metropolitan No. 2* (labeled MET 2) to have already cleared the Range (Respondents' Brief in Opposition App. 3b).

Accordingly, it is obvious that since The Central Railroad Company of New Jersey tow was astern of the Metropolitan tow and to its port, there existed more than ample passing distance between the Metropolitan tow and the *Rincon Hills* at the time "the stem of the tanker missed the the stern of the port carfloat by the narrowest of margins" (Opinion Cross-Petitioner's App. 23a, 24a), which space the *Rincon Hills* was unable to use because of the sole actions of The Central Railroad tug. Since the *Rincon Hills* actually passed The Central Railroad tug and only grounded after a wrongly executed wheel maneuver, it is beyond question that if The Central Railroad tug was not in the vicinity no grounding would have occurred. No finding was ever made by the District Court or the Court of Appeals that the actions of the Metropolitan tow alone would have or could have caused the *Rincon Hills* to ground. Indeed, the position of Deep Sea Tankers, Limited, as indicated in the paragraph above, squarely negates that contention.

How then did the Court of Appeals reach the erroneous conclusion that there was liability upon the part of the Metropolitan tug?

It is apparent that the Court of Appeals in its decision considered the actions of both tows jointly and charged the Metropolitan tug with the faults of the Central Railroad of New Jersey holding it jointly responsible for acts over which it had no control. In doing so, Metropolitan contends that the Court of Appeals applied an

erroneous standard of law with respect to its factual conclusion.

If The Central Railroad of New Jersey tug was at fault in following and attempting to pass the Metropolitan tow to its port and thus crowding the *Rincon Hills*, the onus should fall squarely and solely upon The Central Railroad tug. That the Metropolitan tow were the overtaken vessels is unchallenged. She owed to the *Rincon Hills* a duty with respect to her own navigation; she owed to the *Rincon Hills* no duty with respect to the navigation of the overtaking tow of the Central Railroad of New Jersey. No signals were exchanged between the tows and Metropolitan did not consent to or acquiesce in the navigation of the carfloat tow. Once the Metropolitan tow had cleared the range in sufficient time to allow the *Rincon Hills* the use thereof its duty to the tanker was completely discharged. In creating a relationship between the actions of the overtaking vessels, The Central Railroad tow, and the legal liability of the Metropolitan tow, the Court of Appeals has invoked a legal standard completely unsupported by any case, rule or statute and in complete disharmony with any concept of justice.

Lastly.

It is respectfully submitted the Court of Appeals did not reach the proper result as to liability, on the findings made by it; the question of limitation was never properly reached, and it is prayed that this Court exercise its proper right of supervision to correct a decision which is plainly wrong and in truth represents a miscarriage of justice.

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